U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, D.C. 20001-8002

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Date: December 16, 1999

Case No.: 1997-INA-0553

In the Matter of:

ESPRIT TOUR AND TRAVEL,
Employer

On Behalf Of:

AIRTON JOSE FERNANDES CORREAL,
Alien

Appearance: Barry M. Brumer, Esq.
For the Employer/Alien

Certifying Officer: Floyd Goodman, Region IV

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 2, 1996, Esprit Tour & Travel ("Employer") filed an application for labor certification to enable Airton Jose Fernandes Correal ("Alien") to fill the position of Tour/Transportation General manager (AF 155). The job duties for the position are:

> To oversee and coordinate all of the major areas of the enterprise, including developing plans for operations, finance and hiring and firing. Supervises and orients numerous Department heads in order to coordinate tour company's business in the U.S.A., which includes charter flights, air tickets, ground tours and related services to the South American tourists which form the clientele of the firm.

The requirements for the position are:

Four years of high school and four years of college with a B.S. degree in Management. Other special requirements are fluency in Portuguese, Spanish and English languages. Job may include travel to South America on business.

The CO issued a Notice of Findings on June 18, 1997 (AF 144-48), proposing to deny certification on the grounds that the employer failed to provide documentary evidence that the job opportunity is clearly open to U.S. workers. Specifically, the CO found that Employer must prove that the job opportunity is bona fide and that the position of General Manager actually exists, since initially the application was filed for the position of Vice President. 20 C.F.R. § 656.20(c)(8). Additionally, the CO stated that Mr. Correal did not have a B.S.Degree in Management, thus, the employer must document the actual minimum requirements of the job, 20 C.F.R. § 656.21(b)(5). The CO further stated that the Portuguese and Spanish language requirements are unduly restrictive and the employer must prove business necessity in that these requirements are essential to perform the job in a reasonable manner, 20 C.F.R. 656.21(b)(2)(1).

Accordingly, the Employer was notified that it had until July 23, 1997, to rebut the findings or to cure the defects noted.

In its rebuttal, dated June 17, 1997 (AF 81), the Employer explained the reason for the change of jobs is because the U.S. Department of Labor scheduled $1,143.18 per week as the

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

prevailing wage for Vice President. The Employer had only budgeted $769.25 per week for the job offered. Since the extra monies were unavailable, the tasks of the position were lowered to that of a General Manager so that the salary which could be paid would stand. The Employer stated the advertisements were placed for the lesser job and no U.S. candidates responded. He further stated that speaking a foreign language is a business necessity required by the job since all of the publicity work for Esprit Tour & Travel is required to be conducted in Portuguese as it is directed to Latin American travel agencies. The Employer deleted Spanish as a requirement.

The rebuttal addressed the lack of a B.S. Degree in Management by stating that the Employer hired Josef Silny & Associates to evaluate Mr. Correal's credentials as compared to American workers. The Employer stated that according to Silney Service a degree in Travel/Tourism is a management degree specifically oriented to the field in which the job is offered.

The CO issued the Final Determination on August 8, 1997 (AF 79), denying certification on the grounds that the job is not clearly open to U.S. workers, because the Employer had manipulated the job duties in order to receive a lower prevailing wage, which showed that the Employer was only interested in the Alien. Additionally, the CO found that the Employer did not document the minimum requirements of the job because the Alien did not meet the educational requirement for a B.S. in Management; that since the Alien did not have a B.S. in Management, the Employer had allowed the Alien to qualify with work experience. Thus, the CO found that the Employer required a B.S. in Management from U.S. workers, but allowed the alien to qualify for the job with work experience.

On September 2, 1997, the Employer requested review of the Denial of Labor Certification (AF 1). The CO denied reconsideration on September 10, 1999, and on September 17, 1999, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(5) provides:

> *The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.*

Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien. Thus, the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn,* 89-INA-105 (Feb. 14, 1990). Furthermore, an employer must establish that the alien possesses the stated minimum requirements for the position that is being offered. *Charley Brown's,* 90-INA-345 (Sept. 17, 1991); *Pennsylvania Home Health Services,* 87-INA-696 (Apr. 7, 1988).

In the instant case the Alien clearly does not have the required degree of a B.S. in Management. Employer has offered competent evidence that the Alien has a degree in Travel/Tourism which is comparable to a B.S. in Management. Therefore, we do not challenge the fact that the Alien does have a comparable degree. However, there is no evidence of record that the Alien's degree in Travel/Tourism is the **only** degree which might be considered comparable to the required B.S. in Management.

The case before us is not one in which alternate educational requirements were specifically stated. Yet, by permitting the Alien to qualify using a comparable degree without offering the same opportunity to all U.S. applicants who might have other comparable degrees gives the Alien an unlawful advantage prohibited by 20 C.F.R. § 656.21(b)(5). The case is, therefore, a *de facto* alternate educational requirements case. In fact, Employer's educational requirement is a B.S. in Managment or in the alternative any comparable degree.

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94-INA-544, 95-INA-68 (Feb. 2, 1998) (*en banc*) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. The employer here did not indicate that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5).

Therefore, the CO properly determined that the Employer did not document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, in violation of § 656.21(b)(5).

Order

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.